

**LETTER OPINION
2004-L-26**

April 6, 2004

Mr. Steven Vogelpohl
Lincoln City Attorney
PO Box 2399
Bismarck, ND 58502-2399

Dear Mr. Vogelpohl:

Thank you for your letter asking whether the City of Lincoln may share in or contribute to the cost of paving 66th street, a township road situated outside the city's corporate limits. Specifically, you state that Burleigh County agreed to pay for one-half of the total cost of paving 66th street, and that the City of Lincoln, Apple Creek Township, and the developer of Lincoln Meadows Trailer Park agreed to share the remaining one-half of the total cost. See City of Lincoln Council Meeting Minutes, September 4, 2003. The City of Lincoln however, conditioned its agreement upon the "action being legal." Id.

It is my opinion that the City of Lincoln, through a joint powers agreement, had the authority to agree to pay, and may pay for a share of the cost to pave a portion of the township road located outside the Lincoln city limits.

ANALYSIS

A political subdivision possesses only those powers expressly granted to it by the Legislature or those necessarily implied from the powers expressly granted. Ebach v. Ralston, 469 N.W.2d 801, 804 (N.D. 1991) (cities); Pierce Tp. of Barnes County v. Ernie, 19 N.W.2d 755, 757 (N.D. 1945) (townships); Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924) (counties);. See generally N.D. Const. art. VII, § 2. The legislature granted counties, cities, and townships the authority to plan, develop, operate, maintain, and protect county roads, city streets, and other public thoroughfares. See N.D.C.C. § 24-01-01; ch. 24-05 (county roads); ch. 24-06 (township roads); N.D.C.C. § 40-05-01(8) (city roads).

While there is no statute that specifically provides for cities and townships to enter into contracts relating to the payment of road construction or repair, this type of contract is

permissible under a joint powers agreement.¹ See N.D.C.C. § 54-40.3-01. A joint powers agreement allows any county, city, township, city park district, school district, or other political subdivision of the state to enter into an agreement with any other political subdivision of this state for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them. Id. As such, only one of the parties to the agreement needs to have the statutory authority to take the action that is the subject of the joint powers agreement. N.D.A.G. 2002-F-03; N.D.A.G. 98-L-192; N.D.A.G. 95-L-115; N.D.A.G. 94-F-02; N.D.A.G. 94-L-258; N.D.A.G. 93-F-23; and N.D.A.G. 93-L-190.

A township has the authority to construct, repair, and improve roads. A city could enter into a joint powers agreement with the township for this same purpose. Among other things, a joint powers agreement may provide for:

The manner in which the parties to the agreement will finance the cooperative or joint undertaking and establish and maintain a budget for that undertaking. The parties to the agreement may expend funds pursuant to the agreement, use unexpended balances of their respective current funds . . . and otherwise share or contribute property in accordance with the agreement in cooperatively or jointly exercising or carrying out the power or function.

...

The acceptance of gifts, grants, or other assistance and the manner in which those gifts, grants, or assistance may be used for the purposes set forth in the agreement.

N.D.C.C. § 54-40.3-01(1)(d) and (f).

Therefore, a joint powers agreement would allow all political subdivisions referenced in your letter to share in the costs of paving 66th street. While the owner of Lincoln Meadows would not be a party to the joint powers agreement, as noted above, its financial contribution could be accepted as a “gift, grant, or other assistance” under N.D.C.C. § 54-40.3-01(f).

This office previously stated that a county and township could not enter into a joint powers agreement to loan money for road construction after the township has already entered into a road construction contract and incurred the debt for the construction work. See N.D.A.G. 2000-L-46. In that case, the county wanted to make a loan to a

¹ Although N.D.C.C. ch. 54-40.3 does not require a joint powers agreement to be in writing, that chapter does require the agreement to be approved by the political subdivision's governing body. N.D.C.C. § 54-40.3-01(1), see also N.D.A.G. 96-L-06. Documenting a joint powers agreement in writing is recommended.

township for the completed road construction. Since there was neither statutory authority for the township to accept a loan nor statutory authority for the county to extend a loan to the township there was no "power or function that [was] authorized by law or assigned to one or more of them. See N.D.C.C. § 54-40.3-01(1) and N.D.A.G. 2000-L-46.

In the present case, the city did not want to loan money to the township, rather, the city entered into a joint powers agreement with the township to exercise a power the township was authorized by law to do; specifically, to improve a township road. N.D.C.C. § 24-01-01; N.D.C.C. ch. 24-06. A city official had approved the paving that was the purpose of the agreement before the work was undertaken. Although the official did not have authority to enter into a joint powers agreement on behalf of the city, the city council ratified this agreement at its September 4, 2003, meeting. See N.D.A.G. 2003-L-37. As such, a valid joint powers agreement exists.

Thus, it is my opinion that the City of Lincoln had the authority to agree to pay and, may pay for a share of the cost to pave the township road outside the Lincoln City limits.²

Sincerely,

Wayne Stenehjem
Attorney General

njl/vkk

² This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).